IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 7, 2007

In re: M. B.

Appeal from the Juvenile Court for Robertson County
No. D259663 Max Fagan, Judge

No. M2006-02063-COA-R3-PT - Filed on March 30, 2007

Father of a two year old child appeals the termination of his parental rights, contending the Department of Children's Services failed to prove by clear and convincing evidence that it made reasonable efforts at reunification. Two weeks after the Department took custody of the child, it developed a permanency plan, the goal of which was reunification with the father. Shortly thereafter, the Department assigned the case to Residential Services, Inc., a private social services agency, to which it delegated its responsibilities relative to the plan for reunification, including assisting the father with drug rehabilitation, employment, and housing. Although a social services case manager with the Department continued to monitor the file, all services rendered for and communications with the father were performed by and through RSI's employees. Eighteen months later, the Department filed a petition to terminate of the parental rights of the father, which the trial court granted following a trial. We have concluded that the scant evidence in the record relative to services rendered by RSI is insufficient to prove by clear and convincing evidence that reasonable efforts were made to reunify the father with the child. Accordingly, we vacate the judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Vacated and Remanded

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Christine Brasher, Springfield, Tennessee, for the appellant, B.S.

Robert E. Cooper, Jr., Attorney General and Reporter; and Elizabeth C. Driver, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

B.S. is the father of M.B., the child who is the subject of this proceeding. M.B. lived with and was raised by his parents until he was four months old when, on August 26, 2004, both parents were arrested and taken into custody.[1] As a result of the parents' incarceration and their alleged use of crack cocaine in the presence of M.B., the Department of Children's Services took custody of M.B. on September 7, 2004, pursuant to an ex parte emergency Protective Custody Order. Subsequent to an adjudicatory hearing on the Department's Petition for Dependency and Neglect., M..B. was found to be dependent and neglected.[2]

Two weeks after the Department took custody of M.B., it developed a permanency plan, the stated goal of which was to reunite M.B. with his parents. Pursuant to the plan, Father was to:

(1) become a drug-free parent,
(2) become a responsible parent by participating in a parental assessment,
(3) refrain from violating the law and provide his contact information to his probation officer,
(4) establish residency that will enable M.B. to return to his care, and
(5) establish adequate income to raise a child.[3]

Shortly after the plan was adopted, the Department assigned the case to Residential Services, Inc., a private social services agency. As a consequence, RSI was assigned the responsibilities relative to the plan for reunification, including assisting the father with drug rehabilitation, employment, and housing. Thereafter, all services rendered for and communications with the father were to be performed by and through RSI's employees. The Department limited its role to monitoring the reports submitted by RSI.

Shortly after RSI took over the responsibility of the case from the Department, RSI worked diligently to get Father into a drug rehabilitation program and arranged for temporary housing in the interim. In January, 2005, Father took a significant step to becoming a drug-free parent when he successfully completed a thirty day drug rehabilitation program at Buffalo Valley treatment center.[4] For a brief period after his discharge, Father remained in contact with RSI and had one visit with

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[1] Prior to going to jail, the parents left two children in the physical custody of their maternal grandfather, one being the child who is the subject of this appeal. The children's maternal grandfather later returned the children to the Department because he was unable to care for them. One of the children, J.B., who is not the child of Father, was also taken into custody. Shortly after the court's order, J.B. was placed in the custody of her biological father in Arizona. J.B. is not the subject of this appeal.

[2] Neither parent appealed the dependent and neglected ruling.

[3] The plan included other goals but these are the most significant and are material to the matters at issue.

[4] Father entered into Buffalo Valley in December, 2004.

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M.B. in January, 2005. Father's progress, however, came to an end when he fell out of contact with RSI and the Department after being unemployed and homeless for an extended period.[5]

After Father completed rehabilitation, the responsibility to see that Father's permanency plan continued to rest on RSI. However, after rehabilitation, RSI provided no substantial assistance to Father with regard to finding housing or employment. RSI transported Father to a career center for an assessment, but provided him with no further employment assistance. Essentially, RSI left him to fend for himself. In May, 2005, Father was arrested and incarcerated for aggravated burglary and theft of property.

At the time of the termination hearing in August, 2006, Father remained incarcerated, and according to the record, it is unclear when he would be released. Following a full evidentiary hearing, the trial court found *inter alia* that Father "has been unable to complete the tasks under the permanency plan." The trial court also concluded: (1) Father abandoned M.B. by failing to provide a suitable home and demonstrating a lack of concern for the child, (2) Father abandoned M.B. by incarceration and failed to engage in more than token visitation with M.B., (3) Father was in substantial non-compliance with his responsibility under the permanency plan, (4) there existed persistent conditions which make it probable that the child will be subjected to further abuse or neglect if he is returned to them, and (5) the termination of Father's rights was in the best interest of the child.[6] This appeal followed.

STANDARD OF REVIEW

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, No. M2006-01536-COA-R3-PT, 2006 WL 3740789, at *2 (Tenn. Ct. App. Dec. 19, 2006).

The party seeking to terminate parental rights must prove two elements. That party, the petitioner, has the burden of proving that there exists a statutory ground for termination. Tenn. Code Ann. § 36-1-113(c)(1) (2005); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Furthermore, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2) (2005); *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). *See In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child).

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[5] The last contact between RSI and Father was at the end of January 2005. Several months later, Father notified Ms. Hargrove-Owens, the Department Case Manager, that he was living with M.B.'s mother out-of-state and that they would contact her upon their return to Tennessee. At that time, Ms. Hargrove-Owens attempted to set up a meeting and requested the parents contact information; however, they failed to provide her with the information.

[6] The mother's rights were also terminated but she did not appeal the termination of her rights.

The elements stated above must be established by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1) (2005); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The clear and convincing evidence standard is a heightened burden of proof which serves to minimize the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *In re C.W.W.*, 37 S.W.3d at 474. The clear and convincing evidence standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). It is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. at 766, 102 S. Ct. at 1401; *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), yet it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App.1987). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, *see Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *Brandon*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

On appeal, the trial court's findings of fact are reviewed *de novo* upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re F.R.R.*, 193 S.W.3d at 530. In weighing the preponderance of the evidence, great weight is afforded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See Jones*, 92 S.W.3d at 838.

Questions of law, however, are reviewed *de novo* with no presumption of correctness. *Langschmidt v. Langschmidt,* 81 S.W.3d 741, 744-45 (Tenn. 2002). A trial court's ruling that the facts of the case support a ground of termination, such as the ground of willful abandonment, are examined as questions of law, which are reviewed *de novo* with no presumption of correctness. *In re Adoption of A.M.H.*, __ S.W.3d ___, 2007 WL 160953, at *14 (Tenn. 2007); *Cf. In re Valentine*, 79 S.W.3d at 548 (concluding that substantial noncompliance is a question of law which we review *de novo* with no presumption of correctness).

ANALYSIS

Father contends the Department failed to present clear and convincing evidence that it made reasonable efforts to provide the relevant assistance needed to regain custody of his child. We have determined the evidence does not establish by clear and convincing evidence that the Department's efforts to assist Father met the requisite threshold.

Before parental rights can be terminated, the Department is required to attempt to reunify the child with his or her parents unless the child has been subjected to serious physical abuse or harm. *See* Tenn. Code Ann. § 37-1-166(g) (2006). The Department plays a vital support role in bringing

families back together because the success of a parent's efforts to remedy the conditions that led to the child's removal generally depends on the Department's assistance and support. *In re Giorgianna H.*, 205 S.W.3d 508, 518 (Tenn. Ct. App. 2006).

One of the primary purposes of the statutory scheme that empowers the State to remove a child from a parent's custody is to protect children from "unnecessary separation" from their parents. *In re Tiffany B.*, No. M2006-01569-COA-R3-PT, 2007 WL 595369, at *6 (Tenn. Ct. App. 2007); Tenn. Code Ann. § 37-2-401(a) (2006). Consistent with this expressed purpose, the General Assembly established the policy that once a child is removed from the parents' custody, "the first priority should be to reunite the family if at all possible." *In re Tiffany B.*, 2007 WL 595369, at *6 (citing *In re Randall B., Jr.*, No. M2006-00055-COA-R3-PT, 2006 WL 2792158, at *4 (Tenn. Ct. App. Sept. 28, 2006) (No Tenn. R. App. P. 11 application filed).

> A parent's inability or disinclination to shoulder his or her parenting responsibilities can have a profound and long-lasting effect on a child. Accordingly, the Tennessee General Assembly has recognized that one of the most effective ways to improve the lives of dependent and neglected children is to improve the ability of their parents to be nurturing caregivers. Improving parenting skills results in better parents and, in turn, happier and more well-adjusted children.
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> Even when a parent's conduct requires removing a child from the parent's custody, the Tennessee General Assembly has determined that, in most circumstances, the separation should be for only as long as is necessary to preserve, repair, or reunify the family. *See* Tenn.Code Ann. § 37-1-166(g)(2) (2005). Thus, the statutes governing dependent and neglected children and Tennessee's foster care program reflect a preference for preserving families by reuniting parents and children whenever possible. These statutes also reflect an awareness that reunifying parents and children is best accomplished by helping parents address their own challenges and improve their parenting skills.

In re Tiffany B., 2007 WL 595369, at *6 (footnotes omitted).

The General Assembly recognizes that the ability of parents to rehabilitate themselves depends on the Department's assistance and support. *Id.* at *7. Thus, it has imposed on the Department the responsibility "to make reasonable efforts to reunify children and their parents after removing the children from their parents' home." *Id.*; Tenn. Code Ann. § 37-1-166. Pursuant to the statutory mandate, the Department must "memorialize its efforts in an individualized permanency plan prepared for every dependent and neglected child placed in its custody."*In re Tiffany B.*, 2007 WL 595369, at *7. "The requirements in each permanency plan must be directed toward remedying the conditions that led to the child's removal from his or her parent's custody." *Id.* (citing *In re Valentine*, 79 S.W.3d at 547; *In re M.J.B.*, 140 S.W.3d 643, 656-57 (Tenn. Ct. App. 2004); *In re*

L.J.C., 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003)). Accordingly, permanency plans are uniquely tailored to the rehabilitation needs of the individual parent and child. *See In re Randall B., Jr.*, 2006 WL 2792158, at *5.

The law does not require that the Department's effort to reunify the child and parent be "herculean;" however, the Department must do more than merely provide a list of services to the parent, point them in the right direction, and rely on parents to facilitate their own rehabilitation. *In re Tiffany B.*, 2007 WL 595369, at *7 (citing *In re Giorgianna H.*, 205 S.W.3d at 519). Department employees or those under contract with the state to assist in the case management "must use their superior insight and training to assist the parents in addressing and completing the tasks identified in the permanency plan." *In re Giorgianna H.*, 205 S.W.3d at 519. (citations omitted). In short, they must make reasonable efforts at reunification.

Reasonable efforts are statutorily defined as the "exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1). In cases like this one, the factors that courts use to determine reasonableness include: (1) the reasons for separating the parents from their children, (2) the parents' physical and mental abilities, (3) the resources available to the parents, (4) the parents' efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parents' efforts to address the problems that caused the children's removal, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department's efforts. *In re Tiffany B.*, 2007 WL 595369, at *8 (footnote omitted) (citing *In re Giorgianna H.*, 205 S.W.3d at 519).

It is true the Department bears a heavy responsibility with regard to reunification; however, "parents desiring the return of their children must also make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove their children from their custody." *In re Giorgianna H.*, 205 S.W.3d at 519. Thus, reunification is a "two-way street" and the law does not require the Department to bear the entire responsibility of reunification. *State Dep't. of Children's Servs v. S.M.D.* 200 S.W.3d 184, 198 (Tenn. Ct. App. 2006) (citations omitted).

In accordance with its affirmative duty to make reasonable efforts at reunification, the Department drafted a permanency plan to which Father agreed. The permanency plan identified three principal areas that were crucial to Father's reunification with his child.[7] Therefore, our analysis hinges on whether the Department made reasonable efforts to assist Father in meeting these three goals: (1) become a drug-free parent, (2) obtain sufficient employment and income to support a child, (3) find adequate housing.

[7] There exist other goals in the permanency plan including refraining from violating the law and participating in a parental assessment; however, the three areas discussed here are more important to our analysis.

The Department, through RSI, assisted Father to become a drug free parent by helping Father enroll in an inpatient program at Buffalo Valley Treatment Center. Father successfully completed the thirty day inpatient treatment program. After completing the program, the record suggests Father was left without assistance from the Department or RSI to accomplish the next two critical goals toward reunification with his child, to obtain employment and find suitable housing.

Although completing the inpatient treatment program was a major success, much remained to be done, and Father needed the assistance of the Department or RSI to succeed in accomplishing the goals set by the Department. Moreover, the Department was obligated to assist Father; however, our record fails to show that the Department or RSI rendered any assistance to find employment and housing after Father completed rehabilitation.

Pursuant to the permanency plan, the Department was required to make reasonable efforts to help Father gain employment so that he may establish an income sufficient to raise a child. The only evidence in the record showing that RSI or the Department provided any assistance to help father find employment was the testimony from Ms. Hargrove-Owens, the Department case manager, who stated that her records indicated that RSI provided transportation to a career center for Father to undergo a career assessment. That is the extent of the evidence of the Department's or RSI's efforts to assist Father find employment.

In addition to employment, the Department was required to make reasonable efforts to help Father find housing. The most critical time for the Department to have provided this assistance was when Father successfully completed drug rehabilitation; however, the record reveals that the Department and RSI provided Father with no assistance to find housing that was sufficiently adequate for the child to reside with Father. The only evidence on this point reveals a nonchalant attitude by RSI and the Department. Ms. Hargrove-Owens testified that her records indicate that Father "had housing." As she explained, "I can't testify to whether it was adequate or not." To emphasize the lack of information, and more importantly the lack of effort by the Department or RSI, she stated she believed Father and Mother "were living with friends here and there, but not a residence of their own." This being all of the evidence the Department put forth at the hearing, we have no basis upon which to conclude that the Department made an effort, not to mention a reasonable effort to assist Father to find adequate housing that was suitable for the child to live with Father.

The Department bears the ultimate burden to show that the Department or its agent, RSI, made reasonable efforts to assist Father with drug rehabilitation and finding employment and housing upon release from rehabilitation. *See* Tenn. Code Ann. § 37-1-166. The Department argues, "While there may have been few efforts after [Father] completed rehabilitation, this was due to the fact that [Father] left town shortly after completing the rehabilitation program." The Department's argument, however, appears disingenuous due to the fact the record fails to establish that the Department or its agent, RSI, made reasonable efforts at the critical time, which was immediately upon Father's successful completion of drug rehabilitation.

After assisting Father with his addiction, the record suggests the Department left Father to fend for himself, and to call the Department for help if and when he thought he needed assistance. This expectation was unreasonable, as we explained in *In re Tiffany B.*, 2007 WL 595369, at *9.

> In circumstances that do not involve serious physical abuse or harm to the child, the law does not permit the Department to be passive when it removes children from their parents' custody. The law requires the Department to bring its skills, experience, and resources to bear in a reasonable way to bring about the reunification of the family.

In re Tiffany B., 2007 WL 595369, at *9 (footnote omitted).

The Department not only had the obligation to assist Father during this critical time following his release from drug rehabilitation, it also had the burden at trial to prove the Department or its agent, RSI, made reasonable efforts to do so.[8] In the absence of clear and convincing proof that reasonable efforts were expended to assist Father to accomplish the goals for Father's reunification with the child, we must vacate the order terminating Father's rights[9] for the reasons set forth in *Tiffany B.*, wherein we stated:

> At trial, the Department attempted to lay the responsibility for the parents' lack of remedial progress entirely on the parents themselves. Notwithstanding the undisputed fact that both parents were incarcerated a great deal of the time between October 2004 and December 2005, the case manager insisted that she had been unable to locate or help the parents because they did not contact her and because they were "on the run." While the case manager testified repeatedly that the parents did not telephone her, she failed to provide much detail about her efforts to locate the parents other than her testimony that she had several telephone conversations with Anthony G.'s mother and with Tammy G.'s father.
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> When the record in this case is considered in its entirely, it leaves a distinct impression that the Department did not expend much effort either to locate or to assist either Tammy G. or Anthony G. after it obtained custody of Tiffany B. Despite its knowledge that the parents were addicted to crack cocaine, homeless, unemployed, and facing criminal charges, the Department apparently expected the parents to initiate the remedial efforts on their own and to ask their case manager for help. This expectation was unreasonable. . . .

In re Tiffany B., 2007 WL 595369, at *9 (footnote omitted).

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[8] For reasons that are not explained in the record, the Department failed to call a single employee of RSI to testify in regard to the efforts made to assist Father.

[9] Our ruling renders Father's other issues moot.

Accordingly, since the Department, through RSI, may have expended other significant efforts that pertain to the goals in the Plan in an attempt to assist Father, our remand is intended to be broad enough to permit the Department, should it desire to do so, to present specific and relevant evidence regarding their efforts to provide remedial assistance to Father. If the Department presents additional evidence regarding its efforts to contact and assist the parents, our disposition of this appeal does not prevent the juvenile court from concluding that the Department, with the assistance of RSI, exercised reasonable care and diligence to provide services related to meeting the needs of Father and child.[10]

IN CONCLUSION

This matter is remanded for further proceedings consistent with this opinion. The costs of appeal are assessed against the Tennessee Department of Children's Services.

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FRANK G. CLEMENT, JR., JUDGE

[10] This is consistent with our ruling in *Tiffany B.*, wherein we stated:

> The Department may very well have expended more time and effort attempting to contact and assist Tammy G. and Anthony G. than this record shows. Our remand order is broad enough to permit the Department, should it desire to do so, to present more specific evidence regarding the efforts of all its employees between October 6, 2004 and December 7, 2005 to contact the parents, to provide remedial assistance to the parents, to notify the parents of their rights and responsibilities, and to explain to the parents the consequences of their failure to address the issues that originally caused the children to be removed from their custody. If the Department presents additional evidence regarding its efforts to contact and assist the parents, our disposition of this appeal does not prevent the juvenile court from concluding that the Department exercised reasonable care and diligence to provide services related to meeting the needs of the child and the family.

In re Tiffany B., 2007 WL 595369, at *9, n. 21.